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No. 75-1182

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

CHAMBER OF COMMERCE OF THE UNITED STATES OF
AMERICA, *Petitioner*,

v.

ROBERT FRANCIS, ET AL., *Respondent*.

**REPLY OF CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA TO MEMORANDUM
FOR THE UNITED STATES AS AMICUS CURIAE**

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On May 19, 1976 the Court invited the Solicitor General to express the views of the United States in this case and No. 75-1181.¹ The Solicitor's response, filed on or about October 22, 1976 requires the following reply.

1. The Solicitor General (Mem. 11) invites the Court to accept the *Batterton* petition but deny the Chamber's. Acceptance of this approach to these petitions will preclude review of the very issue raised by the Chamber which must be confronted *before* the merits of *Batterton* can be reached, namely, whether the Congress in creating the federal-state welfare sys-

¹ *Richard A. Batterton, et al. v. Robert Francis, et al.*

tem and the federal labor scheme intended and authorized the HEW Secretary to prescribe regulations granting participating states the option to award federal welfare money to persons whose "unemployment" arises solely from their decision to temporarily withhold their services from their employer and strike in support of their collective bargaining demands.

To be sure Congress in 1968 delegated to the HEW Secretary the authority to define "unemployment" in order to standardize the diverse and conflicting definitions promulgated by the participating states. H.R. Rep. No. 544, 90th Cong., 1st Sess. 108 (1967). But it can not be properly assumed as the Solicitor General does (Mem. 7-10) that the validity of the Secretary's regulations can be determined, at least so far as striking employees are concerned, solely by reference to whether the regulations are a "reasonable" definition of unemployment. Before this question can be reached, a clear delegation of legislative power from Congress to the Executive Branch authorizing the promulgation of standards covering striking employees must be established. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 428-29 (1935). These standards may have significance in other circumstances, but whether Congress granted the Secretary any authority to apply them to striking employees is a question which must be first decided in terms of legislative intent. *Burns v. Alcala*, 420 U.S. 575, 580-85 (1975); cf. *Espinosa v. Farah Mfg. Co.*, 414 U.S. 86, 93-5 (1973); *Big Rivers Elec. Corp. v. E.P.A.*, 523 F.2d 16, 19 (6th Cir. 1975), cert. denied, — U.S. —, 96 S.Ct. 1663 (1976).

The necessity for consideration of this preliminary question of Congressional intent as reflected in federal labor and welfare laws is not only compelled by cus-

tomary legal analysis generally and by the specific approach adopted in *Burns v. Alcala, supra*, to welfare eligibility questions, but also by the Court's ruling in *Super Tire Engin'r Co. v. McCorkle*, 416 U.S. 115 (1974). In that case the State of New Jersey paid federal welfare benefits under the unemployed parent program² to striking employees whose "unemployment" resulted solely from their decision to strike their employer in an effort to obtain increased wages and benefits. These payments were challenged as contrary to and inconsistent with federal labor and welfare policy. A divided panel of the court of appeals held this cause of action moot because the strike concluded prior to the time the District Court entered its order dismissing the case on other grounds.³ On a writ of certiorari, the Court reversed the judgment of the Third Circuit, reinstated the cause of action, and, significantly, remanded the case for consideration of one legal question (416 U.S. at 124) :

whether Congress, explicitly or implicitly, has ruled out [welfare assistance for striking workers] in its calculus of laws regulating labor-management disputes.

The necessity for going beyond the validity of Secretary's regulations in this case is further demonstrated by the legal analysis contained in *Macias v. Finch*, 324 F.Supp. 1252 (N.D. Cal.) (three judge court), *aff'd*, 400 U.S. 913 (1970) cited by the Solicitor General (Mem. 7).⁴ There, two fathers, one working as a security official and the other as a farm worker,

² 42 U.S.C. § 607.

³ 469 F.2d 911 (3d Cir. 1972) (J. Gibbons, dissenting).

⁴ This case is cited at p. 17 of the Petition as supporting the Chamber's petition for a writ of certiorari to the Fourth Circuit.

challenged *inter alia* the Secretary's hours worked definition of unemployment as unconstitutional because this standard supplanted the state need requirements otherwise satisfied by the fathers. The district court upheld the regulations not on their own terms but by specific reference to (324 F.Supp. at 1257) congressional intent as to the scope of the unemployed parent program and (324 F.Supp. at 1260 nos. 9 and 10) to congressional policy for these fully employed fathers as reflected in the Labor-Management Relations Act⁵ and the Fair Labor Standards Act.⁶ Writing for the unanimous panel, Circuit Judge Dunaway stated (324 F.Supp. at 1260-61):

Here the congressional retention, or creation . . . of this particular lacuna in AFDC coverage may be explained by pointing to congressional efforts to maintain adequate wages for employed people through such devices as minimum wage laws (footnote omitted) and collective bargaining rights (footnote omitted). These and similar efforts on behalf of employed people provide a rational basis for exempting employed fathers from the coverage of the [unemployed parent program].

We have contended from the outset in this case that striking fathers are also fully employed, as thus outside the reach of the unemployed parent program because, when one looks to federal labor policy as directed by the two decisions discussed above, one finds that Congress in the 1935 Wagner Act defined a striker to be an employee of the struck employer and to retain continuing and total reinstatement rights (absent picket line or other misconduct) at anytime during or at

⁵ 29 U.S.C. §§ 141 *et seq.*

⁶ 29 U.S.C. §§ 201 *et seq.*

the conclusion of the strike. See also 29 U.S.C. § 159 (c)(3).

The Solicitor General (Mem. 9) appears to agree with us that striking employees are not "unemployed," but this apparent concession does not obviate the task of reviewing congressional welfare and labor policy to resolve the legal question posed in *Super Tire v. McCorkle, supra*, ruled on by the courts below and presented by the Chamber's petition for certiorari in the instant case. We, therefore, respectfully insist these petitions can not properly be separated.

2. The Solicitor General maintains (Mem. 2 n.1) that if the HEW promulgated regulations are *invalid* resolution of the issues posed by the Chamber's petition should be left to the HEW Secretary "in the first instance." The current HEW Secretary has publicly stated that he is awaiting judicial determination of this and other cases before attempting to prescribe any "new" standards or definitions of "unemployment." See pp. 2a-6a of Supplement Jt. App. attached to Petitioner's Reply to Respondent's Opposition to Petition For Writ of Certiorari.

The HEW Secretary has in the past, in exercising his delegated authority to define unemployment, ignored congressional welfare and labor policy which affirmatively directs him to preclude striking employees from the unemployed parent program. In issuing the very amendments to 45 C.F.R. 233.100(a) (1) invalidated in this case, the then HEW Secretary Weinberger specifically stated that he was neither speaking on behalf of Congress nor responding to a specific congressional mandate. 38 Fed. 18549 (1973).

The Solicitor's apparent agreement with our position that striking employees are not "unemployed"

within the meaning of the unemployed parent program and thus outside of the class of the congressional intended recipients of this form of federal welfare suggests that a new appreciation of congressional policy may be anticipated. But this possibility would not be beyond legal challenge unless the Court accepts the opportunity presented by the Chamber's petition to conduct a comprehensive review of the separate federal legislative schemes established for the wage earning member of society like Mr. Francis (see *Anchor Motor Freight v. Hines*, 424 U.S. 554, 563 (1976)), and the worker whose loss of work results from the operation of economic forces far beyond his (or societies) control. Cf. *Carleson v. Remillard*, 406 U.S. 598, 603 (1962). The Secretary's public statements referred to above, reflect a willingness to await delineation of judicial guidelines defining the scope of his legislatively delegated discretion to define unemployment, and there is no reason now for the Court to decline to give this guidance because the Chamber's petitioner poses and the courts below ruled upon, the relevant statutory language in the Labor-Management Relations Act and the Social Security Act and the surrounding legislative materials.

3. The Solicitor General further contends (Mem. 9 n.6) that dismissal of the Chamber's petition is warranted because if the Secretary's regulations are declared *valid* the State of Maryland may properly deny eligibility to striking employees, and thus this portion of the case is moot or no longer a viable "case or controversy." However, such a ruling would *ipso facto* reinstate the *optional* aspect of the HEW regulations which, we contend, do not accurately reflect controlling federal welfare and labor policy. More-

over if, as the Solicitor General states (Mem. 9), the State of Maryland determines federal welfare eligibility for striking employees by reference to whether or not the strike shuts down the employer's productive capacity, then Maryland does *not* unwaveringly proscribe federal welfare benefits to striking employees like Mr. Francis. Thus, in the future Maryland may enroll striking employees in this federal welfare program, and all Maryland employers whose operations fall within the jurisdictional standards of the National Labor Relations Board are subjected to the *continuing* burden that the ability of their employees to support and indeed sustain a strike may be significantly augmented by federal tax monies. We submit this situation represents sufficient injury to sustain the Chamber's petition here.

4. Finally, the Solicitor General states (Mem. 9 n.6) that the legislative intent questions presented by the Chamber do "not warrant review by this Court at this time." This conclusion is devoid of supporting reasoning except for a "cf." reference to *Kimbell, Inc. v. Employment Security Comm'n of New Mexico* (U.S. No. 75-1452), *appeal dismissed* "for want of a substantial federal question" (October 4, 1976). That appeal, which involved only the payment of *unemployment compensation* to employees locked out by their employers during a collective bargaining dispute, was dismissed because, as this Court's October 4, 1976 order indicates, no federal question was decided by the highest New Mexico court. And the Supreme Court has consistently adhered to the jurisdictional principle that it can not review state court judgments resting on non-federal grounds. *E.g., Herb. v. Pitcairn*, 324 U.S. 117, 128 (1944). In the instant case, however, as the Solicitor

agrees, the lower courts reached and decided the federal labor and welfare questions raised here by the Chamber; so the citation to *Kimbell* provides no support for the government's *ipse dixit* that review is not warranted at this time. In any event the Court itself has already recognized the significance of the welfare question posed by the Chamber's instant petition in *Super Tire Engin'r Co. v. McCorkle, supra*. There, the Court stated (416 U.S. at 127): "The judiciary must not close the door to the resolution of the important questions these concrete disputes present." Indeed even earlier in *I.T.T. v. Minter*, 435 F.2d 909 (1st Cir.), *cert. denied*, 402 U.S. 933, *rehearing denied*, 404 U.S. 874 (1971), nineteen states asked the Court to take that case so the same issue posed here by the Chamber's petition could be finally resolved.

Review is even more timely and appropriate now than it was when *Super Tire v. McCorkle, supra*, was remanded for further proceedings in December 1974. On October 4, 1976 the Court noted probable jurisdiction in *Ohio Bureau of Employment Services, et al. v. Hodory* (No. 75-1707). The question for decision is whether state denial of unemployment compensation to employees who are laid off as a result of a collective bargaining dispute at another facility operated by their employer is constitutional. Review of that issue may well necessitate consideration of whether unemployment compensation may be granted or denied to employees immediately involved in a labor dispute because the lower court based its decision in part upon the reasoning that the denial of such benefits to this class of employees would be constitutional. Thus *Hodory* and the instant case present a singular opportunity to consider in tandem if states may pay welfare

or unemployment compensation to employees participating in or affected by a labor dispute. Separate or piecemeal resolution of these important eligibility questions will prolong litigation because the states may continue or create eligibility for employees in whichever program is unaffected by the Court's judgment. The similarity between the eligibility issues posed in *Hodory* and that raised by the Chamber's petition here is underscored by the Solicitor General's Memorandum (p. 8) :

unemployment compensation serves substantially the same purpose as AFDC-UF relief, as Congress was aware. See Section 407 (G)(2)(C)(ii) of the [Social Security] Act.^[7] Since eligibility for either form of relief in large part turns upon the fact of "unemployment," it is not unreasonable to give that term the same substantive content in each scheme.

We agree these programs have a "similar purpose", but further assert that strikers' eligibility for either form of public subsidy must be resolved by looking to the definition of a striker as an employee in 29 U.S.C. § 152(3) of the National Labor Relations Act. Thus, comprehensive review of both forms of subsidies to striking employees can only occur by accepting the Chamber's petition here because unemployment compensation eligibility can, unlike the instant case, be determined solely by reference to the preemption doctrine. *See, e.g., Hawaiian Tele. Co. v. State of Hawaii, Dept. of Labor*, 405 F.Supp. 275 (D.Haw. 1976), *appeals docketed Nos. 76-1584, 2056 (9th Cir. 1976)*.

⁷ This statutory citation, which should read § 407(b)(2)(c)(ii), requires participating states to deny AFDC-UF welfare for "any week" unemployment compensation is paid to the father of a dependent child.

The question of whether striking employees are "unemployed" and thus eligible for federal welfare monies can not be answered by reference to the HEW regulations alone because the validity of any regulations which grant optional or mandatory eligibility for employees engaged in a labor dispute must be resolved, as the Court stated in *Super Tire v. McCorkle, supra*, by reference to federal labor laws. Thus, contrary to the statement of the Solicitor General (Mem. 10), plenary review will obviate further case-by-case litigation of these inextricably intertwined issues only if the Chamber's petition is also accepted by the Court.

CONCLUSION

Comprehensive plenary review of the decisions of the courts below also requires granting the petition for a writ of certiorari in the instant case.

Respectfully submitted,

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